



# Fair Labor Standards Act: Recent Case Handling Experience and Dealing with Union Requests for Information

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# FLSA- HISTORY AND BACKGROUND

- Fair Labor Standards Act, 29 USC Sec 201 et seq.  
The Department of Labor administers for the private sector
- 1974 – Congress extends FLSA to cover federal employees
- Non-exempt federal employees are covered by OPM regulations at 5 CFR part 551
- Exempt employees are not covered by FLSA but are subject to 5 USC 5541 and 5 CFR part 550

# FLSA- HISTORY AND BACKGROUND

- *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) – Unless excluded from the scope of a negotiated grievance procedure, the negotiated grievance procedure is the exclusive avenue for bargaining unit employees to raise FLSA matters. This includes potential submission to binding arbitration.

# FLSA - Basics

- All employees are presumed to be non-exempt (i.e. covered by FLSA) unless they meet one of the statutory exemptions from coverage. Exemptions are construed narrowly.
- The Agency has the burden of justifying FLSA exemptions on an individual employee basis. Must look at both positions descriptions and the duties actually performed by each employee to determine whether exemption standard is met

# FLSA - Basics

- The most common FLSA exemptions are:
  - *Administrative Exemption:* Employee whose primary duty is the performance of office or non-manual work directly related to the agency's management or general business operations and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. Be careful of the terms "discretion and independent judgment" and "matters of significance" It is not enough that the work is considered administrative in nature.

# FLSA - Basics

- *Executive Exemption:* Employee is a supervisor or manager who manages a federal agency or any subdivision, regularly directs two or more employees, and has the authority to hire or fire employees (or whose recommendations regarding hiring, firing, advancement, promotion or other changes of status of other employees are given considerable weight.

# FLSA - Basics

- *Professional Exemption:* Employee whose primary duty must involve work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Typical occupations include law, medicine, accounting, engineering, teaching, chemical and biological sciences, creative and artistic positions, and computer positions such as systems analysts, programmers, software engineers, and systems designers

# FLSA - Basics

- *Law Enforcement and Firefighters:* A partial exemption applies requiring them to work 43 hours per week (vice the usual 40) before overtime compensation is mandated. See 29 USC Sec 207.



# FLSA - Basics

- Under FLSA, non-exempt employees receive overtime whenever they work in excess of eight hours in a daily tour of duty or in excess of 40 hours in a weekly tour of duty.
- FLSA non-exempt employees must be compensated for all hours of work they perform that is “suffered or permitted” to occur by management. Even if the work was not ordered or approved in advance, overtime is required where management is aware that the employee is performing the work and it fails to act in a reasonable time to stop the employee from performing the work.

# FLSA - Basics

- Overtime is compensable in 15 minute increments
- Non-exempt employees working authorized flexible or compressed work schedules may earn credit hours in lieu of overtime premium pay. See 5 USC 6122. However, if directed to work, overtime pay is required
- Statute of limitations on back pay is two years; three years if violation is considered to be willful.

# FLSA - Basics

- Liquidated damages equal to the amount of the back pay is presumed unless management can establish it acted in good faith. Good faith is a substantial burden and agency must show that it had reasonable grounds for believing that its act or omission was not a violation of FLSA. Cases have indicated that “double damages are the norm; single the exception.”
- Attorney fees are available under FLSA and can be awarded by an arbitrator

# FLSA Key FLRA Decisions

- DHHS, SSA, Baltimore, MD and AFGE, 44 FLRA 773(1992)
  - Discusses the relative roles of DOL (private sector) and OPM (federal sector) in administering FLSA. DOL has the lead for interpreting the provisions of FLSA. Where there is a conflict, DOL interpretation controls
  - Cannot presume FLSA status based on GS grade
  - Reinforces legal standard that exemptions are to be interpreted narrowly.
  - Performing the basic production work of the agency does not meet the administrative exemption. See also 49 FLRA 483 (1994)
  - Thousands of agency employees found to be misclassified. Back pay in the millions of dollars.
  - FLRA orders liquidated damages. Good faith not established despite agency's alleged reliance on OPM guidance regarding the scope of the administrative exemption.
  - Arbitrator award sustained despite inconsistency with OPM "expert" witness who testified that agency correctly classified employees as exempt

# FLSA Key FLRA Decisions

- Federal Deposit Insurance Corporation and NTEU, 53 FLRA 1469 (1998)
  - Good case discussion on the scope of the professional exemption. Agency wins case on some employees; settled other employee claims on the basis that they had been misclassified as exempt.
  - FLRA overturns arbitrator decision and awards liquidated damages to employees who had been misclassified. Significant discussion of the good faith standard and how difficult it is for agencies to avoid liquidated damages. See also 56 FLRA 280 (2000)
  - Changes prior case law on statute of limitations on back pay. Previous to this, FLRA had held that arbitrators had leeway to fashion back pay and some had awarded up to 6 years. FLRA now holds that 2 year statutory back pay provision in FLSA (3 if violation is willful) applies to federal sector grievance and arbitration processes.

# FLSA Key FLRA Decisions

- Dept of the Navy, Naval Explosive Ordnance Disposal Technology Division, Indian Head, MD and AFGE Local 1923, 57 FLRA 280 (2001)
  - Case discusses the professional exemption as applied to electronic and engineering technicians. Arbitrator finds that they were improperly classified as exempt and orders back pay and liquidated damages.
  - Unions have statutory and contractual right to file class action or group grievances on behalf of employees notwithstanding FLSA provision that states employees have to specifically opt-in to class FLSA cases filed in other judicial proceedings. FLRA case distinguishes between substantive provisions of the Act, such as statute of limitation on back pay and liquidated damage provisions, and procedural provisions of the Act, such as the class action process. The latter are not binding in federal sector grievances and arbitrations.

# FLSA Key FLRA Decisions

- Dept of Commerce, NOAA, Office of Marine and Aviation Operations, Norfolk, VA, 57 FLRA 559 (2001)
  - Good case discussion regarding the union's burden in establishing willfulness to justify a 3 year, vice 2 year, statute of limitations on back pay under FLSA. Arbitrator found that only 2 years is warranted.
  - One of the relatively infrequent cases where liquidated damages were not awarded because the agency did act in good faith. Case discusses the types of actions the agency would need to take to overcome the FLSA presumption that liquidated damages are warranted.
- SSA, OHA, Falls Church, VA and AFGE Local 3615, 55 FLRA 349 (1999)
  - Case discusses the fact that liquidated damages are only appropriate where overtime work was performed. If overtime opportunities are denied, but overtime work is not performed, the Back Pay Act applies (compensation for hours that should've been worked) but no liquidated damages are added

# FLSA Responding to 7114(b)(4) Requests

- Union's statutory right to information may extend to materials requested in connection with grievances over FLSA entitlements
- Union can request information to process a grievance or arbitration or to determine whether or not to file a grievance



# FLSA Responding to 7114(b)(4) Requests

- Information must be normally maintained by the agency in the regular course of business, reasonably available, relevant and necessary for discussion, understanding and negotiation of subjects within the scope of collective bargaining, and not otherwise prohibited from disclosure by law.
- See Reference Guide handout for types of information generally requested by unions in connection with FLSA grievances.

# FLSA Responding to 7114(b)(4) Requests

- Management must always reply to an information request even if the material doesn't exist or there is no statutory duty to provide the material

# FLSA Responding to 7114(b)(4) Requests

- Particularized need – Union must articulate, with specificity, why it needs the information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities. It is not enough that the requested material is merely useful or relevant. If particularized need is not apparent in the union's request, agency should ask the union to identify the need.

# FLSA Responding to 7114(b)(4) Requests

- In responding to an information request, the agency must clearly articulate the specific reasons why it is not providing the requested information.
- Unions will likely seek information in FLSA to determine:
  - Whether FLSA designations were made correctly
  - Number and location of potential grievants
  - Appropriate remedies, including amount of possible back pay

# FLSA Responding to 7114(b)(4) Requests

- Analytical framework for reviewing information requests:
  - Did the union establish a particularized need?
  - Is the union request specific enough to allow the agency to make a reasoned determination on whether it needs to disclose the information under the Statute?
  - Does the requested information exist? Are there alternative methods through which the union can obtain the information?

# FLSA Responding to 7114(b)(4) Requests

- Can the agency demonstrate a countervailing interest in not disclosing the information?

*See handout for suggestions on responding to specific requests for information concerning FLSA grievances*

# Recommended Management Actions

- Don't necessarily wait for the union to file a grievance. Proactively investigate accuracy of FLSA exempt and non-exempt designations
- Prompt, pre-emptive review may strengthen the agency's position in grievance and arbitration proceedings, including limiting back pay obligations. May help establish good faith defense to liquidated damages and negate willfulness needed to support three year statute of limitations on back pay.

# Recommended Management Actions

- Actively involve classification experts and review prior FLSA cases. Ensure that DOL standards for exemption are followed
- Be ready to change designation of specific positions if narrow exemption criteria are not met. Not all employees on same PD may justify common FLSA designation



# FLSA Grievances

- If a grievance is filed
  - Conduct a serious, objective investigation into whether relevant FLSA designations are consistent with law and regulation. Note that the agency has the burden of proving exemptions
  - Look to history behind the FLSA designations in question and determine whether, and to what extent, the designations have been reviewed

# FLSA Grievances

- Advise management of FLSA presumptions and entitlements. Prepare management for the fact that there could be significant monetary liability
- Consider potential settlement options
- Determine to what extent like positions should be consolidated for processing. The union will generally be seeking such consolidation. Arbitrators may look favorably on hearing testimony and receiving evidence on a few employees that can be applied to the class of grievants.

# FLSA Grievances

- Determine whether the grievance was filed timely under the negotiated grievance procedure. Although the period of back pay is set by statute, case law is unclear on whether the time limits for filing a grievance limit the ability to initiate a grievance involving FLSA. See AFGGE Local 3882 and Dept of Justice, Federal Correctional Institution, Ray Brook, NY, 59 FLRA 469 (2003)

# FLSA Grievances

- If arbitration is requested, very carefully research potential arbitrators to see whether, and in what way, they have previously ruled on overtime cases and issues

# FLSA Settlement Considerations

- Attempt to get union to back off some positions in return for agency extending FLSA coverage to other positions
- Process for administering employee back pay claims, especially regarding alleged suffered and permitted overtime
- Two year statute of limitations vice three (willful violations)
- Reduction of liquidated damages

# FLSA Settlement Considerations

- Cap on union attorney fees
- Treatment of employees previously receiving comp time in lieu of overtime pay
- FLRA rarely overturns arbitration awards, especially regarding fact determinations such as whether a specific position meets exemption criteria